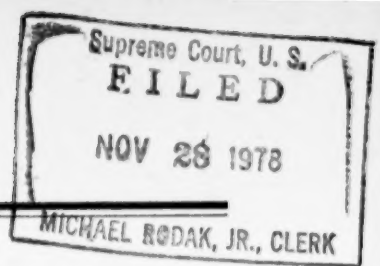


No. 78-689



In the Supreme Court of the United States

OCTOBER TERM, 1978

ALEXANDER SHARP, II, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF
PUBLIC WELFARE, APPELLANT

v.

CINDY WESTCOTT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM FOR THE FEDERAL APPELLEE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530



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STATEMENT

Appellant does not contest the merits of the district court's decision holding Section 407 of the Social Security Act, 42 U.S.C. 607, unconstitutional. That decision is the subject of the Secretary's appeal in *Califano v. Westcott*, No. 78-437. Appellant seeks review only of the district court's subsequent refusal to amend its remedial order.

1. The district court held that Section 407 of the Social Security Act, which provides benefits to two-parent families in which a dependent child has been deprived of parental support because of the unemployment of his father but does not provide benefits when the mother is unemployed,¹ violates the Due Process Clause of the Fifth Amendment. It also concluded that the implementing Massachusetts regulations violate the Equal Protection Clause of the Fourteenth Amendment.

Finally, the district court concluded that the proper remedy is the extension of the AFDC-UF program to all families with needy dependent children where either parent is unemployed within the meaning of the Act and implementing regulations. Accordingly it enjoined appellant from refusing to grant AFDC-UF benefits to families with children deprived of parental support by reason of the unemployment of the mother under the same standards as appellant provides benefits to families in which the father is unemployed. The court also enjoined the enforcement of Section 407 insofar as it prohibited the Secretary of Health, Education, and Welfare from approving a Massachusetts AFDC plan or the payment of federal matching funds to Massachusetts families eligible for AFDC benefits but for the fact that the mother rather than the father is unemployed.

¹ The Aid to Families With Dependent Children—Unemployed Father (AFDC-UF) program is more fully described in our jurisdictional statement in *Califano v. Westcott*, *supra*, at 2-4.

2. Appellant moved for clarification or modification of the district court's order to permit the adoption of a state plan providing benefits only to families with dependent children who were deprived of parental support by reason of the unemployment of the parent who had been the principal wage-earner.

On August 9, 1978, the district court declined to amend its order, concluding (J.S. App. 13a) that any further reformulation of the statutory scheme beyond deletion of the gender distinction was a matter for Congress, and that the State of Massachusetts was "not free to narrow the federal standards that define the categories of people eligible for aid" under the AFDC program," quoting *Quern v. Mandley*, No. 76-1159 (June 6, 1978), slip op. 15.

ARGUMENT

Appellant contends that the district court erred in refusing to authorize the State to adopt an AFDC-UF plan limiting benefits to families in which the primary wage-earner is unemployed. He urges (J.S. 12-17) that the legislative history of Section 407 demonstrates that Congress intended to provide aid to children in families in which the breadwinner was unemployed, and that an unqualified extension of Section 407 to families where either parent is unemployed would broaden the AFDC program beyond Congress' intent. Appellant also urges (J.S. 17-19) that the district court failed to consider the greatly increased cost of extending AFDC benefits to families where either parent is unemployed, which, appellant argues,

supports the view that Congress would respond to the deletion of the gender distinction in Section 407 by limiting benefits to families where the primary wage-earner is unemployed.

These arguments do not warrant plenary review by this Court. The district court properly concluded (J.S. App. 13a) that appellant may not adopt a plan that would "‘narrow the federal standards that define the categories of people eligible for aid’ under the AFDC program," quoting *Quern v. Mandley*, *supra*, slip op. 15. See *Burns v. Alcala*, 420 U.S. 575, 578 (1975); *Townsend v. Swank*, 404 U.S. 282, 286 (1971); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968).

Section 407(a) gives the Secretary, not the states, the authority to set standards for the unemployment necessary to make a family eligible for AFDC benefits. It defines the term "dependent child" to include "a needy child who meets the requirements of [42 U.S.C. 606(a)(2)] who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *." The regulations adopted by the Secretary do not give the states the option of limiting their plans to families where the primary wage-earner is unemployed; these regulations require each state to adopt a definition of an unemployed father that "must include any father" who meets certain stated requirements. 45 C.F.R. 233.100(a)(1).

Because the district court did not purport to restrict the Secretary's authority to define "unemployment" in any gender-neutral way, or to prevent any state dissatisfied with the federal standards to withdraw from this portion of the AFDC program, the district court's order of August 9, 1978, is correct.

CONCLUSION

The Court should defer consideration of this appeal pending its decision in *Califano v. Westcott*, No. 78-437. If it affirms the judgment in No. 78-437, then it should affirm the order challenged here as well. If it reaches any other conclusion in No. 78-437, then it should dispose of this appeal as appropriate in light of the disposition of No. 78-437.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978